No. 11705

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM I. HEFFRON, Trustee of the Estate of Quartz Crystal Products Co., a limited partnership composed of Raymond I. Biggy, John W. Buol and James F. Collins, Bankrupt,

Appellant,

vs.

U. S. MACHINERY COMPANY,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

Statement of Issues Involved.

I.

The contracts here involved are conditional sales contracts, notwithstanding that they contain language describing them as leases.

II.

The words "on or about November 10, 1944," used by appellee in Paragraphs III and IV of its Petition of Reclamation herein and used again by appellee in Paragraph IV of its Complaint in Case No. 3172, Calaveras County Superior Court, amount to an admission by appellee that the conditional sales contracts were made and entered into within one or two days of November 10, 1944.

POINT I.

The Contracts Here Involved Are Conditional Sales Contracts, Notwithstanding That They Contain Language Describing Them as Leases.

In Point I of its reply brief, appellee constantly refers to the contracts herein involved as "leases." (*A. B. p. 6.)

Both the Referee and the District Court have expressly held that the agreements are *conditional sales contracts,* notwithstanding that they are styled as leases on their face. Appellant has never contested this determination. Nor is it now in a position to do so. It is clear that, by reason of the reservation of title, and by reason of the provisions concerning the rights of the appellee in the event of default, these agreements *must be conditional sales contracts.*

The holding of the Referee and the District Court in this respect is in accord with the well established law of California.

U. S. Machinery Co. v. International Metals Dev. Inc., 74 A. C. A. 4;

Parke & Lacy Co. v. White River Lumber Co., 101 Cal. 37;

Lundy Furniture Co. v. White, 128 Cal. 170;

Silverstin v. Kohler & Chase, 181 Cal. 51;

Hogan v. Anthony, 40 Cal. App. 679;

22 Cal. Jur. 1097;

24 R. C. L. 449.

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*"A. B." will be used throughout this brief in place of "Appellee's Brief."

It is therefore respectfully submitted that there is no issue here presented concerning the sufficiency of the execution of a "lease" and that the only question with which we are here concerned is: What are the requirements for "execution," under Section 2980, Civil Code, of a conditional sales contract?

POINT II.

The Words "on or About November 10, 1944," Used by Appellee in Paragraphs III and IV of Its Petition of Reclamation Herein and Used Again by Appellee in Paragraph IV of Its Complaint in Case No. 3172, Calaveras County Superior Court, Amount to an Admission by Appellee That the Conditional Sales Contracts Were Made and Entered Into Within One or Two Days of November 10, 1944.

Appellee, in Point II of its reply brief, contends that the words "on or about November 10, 1944," used in the above-mentioned paragraphs of its Petition and its Complaint, do not limit the time referred to thereby to November 10. [Tr. pp. 14, 15, 80 and 94.]

It is admitted that the conditional sales contracts were not recorded until December 18, 1944. [Tr. p. 70.]

The date twenty days prior to December 18, 1944, was November 28, 1944.

Therefore, appellee is in effect contending that the words "on or about November 10, 1944," used as aforesaid, mean—not November 10, 1944,—but November 28, 1944.

We respectfully submit that such an interpretation is logically preposterous and contrary to the law of this State.

It is interesting to note that appellee has not cited one authority in support of its bizarre contention in Point II of its brief concerning the meaning of the phrase "on or about November 10, 1944." Nor has appellee cited any authorities in support of any of the other points raised in its brief.

In the case of *Boscus v. Waldmann,* 31 Cal. App 245, 258, the Court, in construing an allegation in a complaint to foreclose a mechanic's lien that the building was completed "on or about" a specified date, said:

> "But we think that the phrase 'on or about' should be held to mean either the day mentioned or a day in very near proximity thereto. It cannot reasonably be held to mean, in other words, if not the day designated, a day ten, fifteen, or twenty days therefrom. Ordinarily, it is understood to refer to a day or two before or subsequent to the day specifically named."

In *Santa Monica Lumber & Mill Co. v. Hege,* 48 Pac. 69, 71, the Court held that where a contractor filed a statement for mechanic's lien that materials had been furnished on or about *July 1st*, the contractor could not succeed on proof based on delivery on *May 24th.*

In *Hope v. Scranton & Lehigh Coal Co.,* 105 N. Y. S. 372, 120 A. D. 595, it was held that an admission in an answer of service of a claim on or about June 16, 1906, could not be deemed an admission of service made one day prior thereto, to wit, June 15, 1906.

In *Brown & Bigelow v. Bard,* 118 N. Y. S. 371, 374, 64 Misc. 249, a contract for the sale of calendars provided that the calendars should be shipped by freight and delivered f. o. b. cars "on or about" November 1st. On December 8th the seller shipped the goods by express, and the buyer received them six days later. It would take a package from eight to twenty-two days to be carried by freight. The Court held that the seller had failed to deliver on time.

The general rule is set forth in 1 Corpus Juris Secundum 347 as follows:

> "But in these cases where the time is material, or where precision is intended or necessary, the use of the words [*on or about*] is not approved; and when used in such a sense as to become a part of the contract it denotes an approximation to exactness."

In *North American Ginseng Co. v. Gilbertson,* 206 N. W. 610, 611, 200 Ia. 1349, the Court held:

> "The term 'about November 1st' admits of some flexibility, but it must nevertheless be held to mean substantially the date fixed or near approximation thereto. Six weeks after November 1st could hardly be said to have been within the contemplation of the parties. The term admits of no such flexibility when used in a contract to fix a time for the delivery of a commercial product. Freeman v. Hedrington, 204 Mass. 238, 90 N. E. 519, 17 Ann. Cas. 741; O'Brien v. Higley, 162 Ind. 316, 70 N. E. 242; White v. McMillan, 114 N. C. 349, 19 S. E. 234; Loomis v. Norman Printers' Supply Co., 81 Conn. 343, 71 A. 358; Paine v. Newell, 66 Mich. 245, 33 N. W. 491."

We respectfully submit that precision was intended and was necessary with respect to the allegations concerning execution of the conditional sales contracts herein involved. The allegations in the Petition and in the Complaint that these conditional sales contracts were made and entered into on or about November 10th must be deemed to mean within a day or two of November 10th—and cannot possibly be deemed to include a date as late as November 28th.

Respectfully submitted,

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